Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	)	CC Docket No. 02-39

JOINT REPLY COMMENTS OF VOICESTREAM WIRELESS CORPORATION AND WESTERN WIRELESS CORPORATION

VoiceStream Wireless Corporation ("VoiceStream")[1] and Western Wireless Corporation ("Western Wireless")[2] hereby reply to certain of the comments that were filed in response to the *Equal Access Notice of Inquiry*.[3]

The Commission commenced this *Notice of Inquiry* to examine "the equal access and nondiscrimination obligations of incumbent local exchange carriers. ["ILECs"]"[4] Representatives of certain rural ILECs – the National Telecommunications Cooperative Association ("NTCA") and Fred Williamson and Associates ("Williamson") (collectively, "Rural ILECs") – urge the Commission to expand the scope of this inquiry to impose new equal obligations on

[1] VoiceStream, combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S. with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers. VoiceStream and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both VoiceStream and Powertel are, however, operated together and are referred to in this request as "VoiceStream."

[2] Western Wireless is the leading provider of cellular service to rural areas in the western United States. The company owns and operates wireless phone systems marketed under the Cellular One® national brand name in 19 states west of the Mississippi River. Western Wireless owns cellular licenses covering about 30% of the land in the continental United States. It owns and operates cellular systems in 88 Rural Service Areas ("RSAs") and 18 Metropolitan Statistical Areas ("MSAs") with a combined population of around 9.8 million people.

[3] *See Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39, *Notice of Inquiry,* FCC 02-57 (Feb. 28, 2002), *summarized in* 67 Fed. Reg. 10919 (March 11, 2002)("*Equal Access NOI*").

[4] *Id.* at ¶ 1.

providers of commercial mobile radio service ("CMRS"). VoiceStream and Western Wireless demonstrate below that the Commission cannot grant the relief requested as a matter of law, even should the agency be willing to expand the scope of this inquiry.

I. THERE IS NO BASIS IN LAW OR POLICY TO EXTEND EQUAL ACCESS OBLIGATIONS DESIGNED FOR MONOPOLISTS TO THE COMPETITIVE CMRS INDUSTRY

The Rural ILECs ask the Commission to "revis[e] its equal access rules to apply them equally to . . . wireless carriers."[5] The Rural ILECs define equal access as the ability of customers "to select the interexchange carrier of their choice on a one-plus dialed basis."[6] The Commission cannot grant this request as a matter of law.

Congress amended the Communications Act in 1996 to prohibit the Commission from imposing an equal access obligation on CMRS carriers. Section 332(c)(8) of the Act provides in relevant part:

> A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services.[7]

The Commission has recognized that because of this statute, "[w]e do not have the authority to require CMRS providers to offer equal access."[8] Thus, by law, the Commission cannot grant the

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[5] Williamson Comments at 3. *See also* NTCA Comments at 2-3. NTCA's reference to CMRS providers as "wireless CLECs" (*id.* at 3) is both misleading and inaccurate. Although CMRS carriers provide local exchange service, Congress has determined that they are not local exchange carriers ("LECs.") *See* 47 U.S.C. § 153(26)("Such term [local exchange carrier] does not include a person insofar as such person is engaged in the provision of a commercial mobile service.").

[6] Williamson Comments at 2.

[7] 47 U.S.C. § 332(c)(8). This statute does permit the Commission to impose an access code requirement on CMRS providers, but only if "the Commission finds it to be in the public interest to apply such requirements." *Id.* However, the Commission has determined that there is no basis to impose on the competitive CMRS industry an "unblocked access rule." *See Interconnection and Resale Obligations Applicable to CMRS Carriers*, 11 FCC Rcd 12456, 12457 ¶ 3 (1996).

[8] *Interconnection and Resale Obligations Applicable to CMRS Carriers*, 11 FCC Rcd at 12457 ¶ 3 (Commission closes docket commenced to investigate the possibility of imposing an equal access requirement on CMRS carriers).

relief the Rural ILECs seek. The Rural ILEC attempt to color this as a "regulatory parity" issue widely misses the mark.

There would also be no reason to impose an equal access obligation on CMRS carriers even if the Commission possessed the flexibility to do so. An equal access requirement makes sense when a LEC possesses market power. As consumer advocates have advised the Commission:

> Customers of [Rural ILEC] companies should not be faced with only one provider of local service – the ILEC – and only one viable interexchange provider – the ILEC's. The Commission should retain existing equal access and nondiscrimination obligations on non-BOC ILECs.[9]

If consumers do not enjoy a choice in their provider of local telecommunications services, they should at least enjoy a choice regarding interexchange carriers ("IXCs").

In contrast, equal access requirements make no sense for carriers operating in competitive markets. As the Commission has noted, because CMRS providers compete with each other to provide the lowest overall rates for their customers, they "attempt to obtain the lowest rates for toll services from intraLATA and interLATA toll carriers."[10] Indeed, the imposition of equal access on wireless would increase the costs mobile customers pay since the individual customer could not obtain the large-scale wholesale pricing efficiencies that a wireless carrier can obtain from one or more IXCs. As always, if a mobile customer does not like the quality or the features of the interexchange services provided by its serving CMRS carrier, he or she can simply switch to the services of another CMRS provider.[11] The evidence confirms that mobile customers exer-

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[9] National Association of State Utility Consumer Advocates at 6.

[10] *Second Subscriber Carrier Selection Order,* 14 FCC Rcd 1508, 1561 n.276 (1998).

[11] With many CMRS service plans, the "local" calling area is often Major Trading Area ("MTA") wide. Because MTAs cross state and LATA boundaries, a "local" calling area is created in the wireless context where traditionally the coverage would be viewed as "long distance or toll" in the wireline context. Further, CMRS carriers frequently "bundle" the cost of interexchange services into the cost of service as a whole, creating a cost structure that is simple and transparent to most customers, who view the identity of the particular interexchange carrier handling a particular

cise their right to change serving carriers; during 2000 alone, nearly one in five mobile customers – over 20 million Americans – switched serving carriers.[12]

Commissioner Abernathy noted three weeks ago that "the CMRS marketplace is by far the most competitive market in the Commission's purview."[13] The facts fully support this observation. Since December 1997, when the Bureau of Labor Statistics began monitoring CMRS prices, the average price of interstate long distance service fell by 19 percent.[14] During the same 4.5-year period, *the average price of mobile service, which includes a long distance component, has fallen by 32 percent*.[15] In stark contrast, during this same period, the price for basic fixed telephone service increased by 14 percent.[16] There is, therefore, utterly no basis to the Rural ILEC unsupported assertion that the inability of mobile customers to select an IXC of "their choice on a one-plus basis . . . is at odds with a competitive market."[17]

One factual inaccuracy made by the Rural ILECs especially merits correction. The Rural ILECs assert that CMRS carriers enjoy "a distinct competitive advantage in that they can compete directly against rural ILECs without incurring the additional cost of providing equal access":

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call as unimportant. Any attempt to force an "equal access" regime on intra-MTA calls would be profoundly complex, requiring carriers to separate-out calls now handled seamlessly.

[12] *Sixth Annual CMRS Report,* 16 FCC Rcd 13350, 13373 (2001).

[13] Remarks of FCC Commissioner Kathleen Q. Abernathy, National Spectrum Managers Association, at 2 (May 21, 2002). *See also Sixth Annual CMRS Report,* 16 FCC Rcd at 13371 ("[E]xisting [CMRS] markets demonstrate a high level of competition for mobile telephony customers.").

[14] The CPI for interstate toll services was 77.3 in December 1887 and 62.2 in April 2002. *See* http://data.bls.gov/lab-java/outside.jsp?survey=cu.

[15] The CPI for mobile service was 100 in December 1997 and 67.6 in April 2002. *See id.*

[16] The CPI for basic telephone service was 163.8 in December 1997 and 186.8 in April 2002. *See id.*

[17] Williamson Comments at 3.

> Requiring [CMRS providers] to offer equal access would . . . assist the Commission in ensuring that no entity receives an unfair competitive advantage as a result of regulatory requirements and costs associated with providing equal access.[18]

This argument is inconsistent with the facts. The Rural ILECs have forgotten that they *supported* imposition of an equal access rule on themselves.[19] The Rural ILECs also have forgotten that, unlike the Regional Bell Operating Companies ("RBOCs") (which were required to recover their equal access costs over an eight-year period ending in 1993), they received a special waiver so they could expense their equal access costs in the year the costs were incurred.[20] The Rural ILECs recovered their equal access conversion costs long ago, thus their complaint that they are at a cost disadvantage *vis-à-vis* CMRS carriers relative to their provision of equal access lacks merit.

In the end, the Rural ILECs hope to convince the Commission to impose new equal access obligations on CMRS carriers, not because consumers would benefit (they would not), but because their competitive position in the markets would be enhanced if CMRS carriers were forced to incur substantial new costs to comply with a new government mandate.[21]

II. THERE IS NO BASIS IN LAW OR POLICY TO PENALIZE CMRS PROVIDERS BECAUSE, CONSISTENT WITH A CONGRESSIONAL MANDATE, THEY DO NOT PROVIDE EQUAL ACCESS

The Rural ILECs alternatively argue that the Commission should penalize CMRS carriers because they do not provide equal access. Specifically, the Rural ILECs assert that CMRS carri-

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[18] NTCA Comments at 2-3. *See also* Williamson Comments at 3 ("ILECs that have expended the costs to provide equal access are placed at a competitive disadvantage because of the dissimilar requirements that they must face versus those faced by their competitors (the CLECs and wireless providers).").

[19] *MTS/WATS Market Structure – Phase III Order,* 100 F.C.C.2d 860, 866 ¶ 16 (1985)("The ITCs [independent telephone companies] generally support the proposal that they be required to implement equal access.").

[20] *See NECA Waiver Order,* 3 FCC Rcd 6042 (1988).

[21] The entire concept of equal access and interexchange service makes no sense in today's CMRS market. With digital "one rate" plans, there is often no longer a distinction between a "local" call and a "toll" call. For all practical purposes, with such plans the "exchange area" has become coextensive with the United States.

ers should be either ineligible to receive any Universal Service support or ineligible to receive the new Interstate Common Line Support. The simple response is that these arguments should be made in the Universal Service docket (CC Docket No. 96-45), not in a proceeding that focuses on the equal access obligations of carriers *other than* CMRS providers.[22]

A. Eligibility to Access Universal Service Funds. The Williamson consulting firm asks the Commission to "revise its universal service rules to require that all Eligible Telecommunications Carriers (ETCs) meet the equal access and nondiscrimination obligations":

> It is grossly unfair, discriminatory and anticompetitive, both to incumbent ILECs, ETCs and consumers to allow CLECs and wireless ETCs to avoid this competitive requirement, while at the same time allowing them to receive universal service funding for inferior service.[23]

The Commission and the Joint Board have already rejected this argument. The Commission determined, consistent with the Joint Board recommendation, that equal access should *not* be among the services supported under Section 254(c)(1), holding that imposition of equal access "would undercut local competition and reduce consumer choice and, thus, would undermine one of Congress's overriding goals in adopting the 1996 Act."[24] And, there certainly is no basis to deprive CMRS carriers of eligibility to receive Universal Service support because they do not provide a capability that Congress has specifically determined they should not provide.[25] Hence, the Commission should reject this attempt to use the Eligible Telecommunications Carrier

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[22] In fact, NTCA has already raised its arguments in the Universal Service docket. *See* NTCA Petition for Reconsideration, CC Docket Nos. 96-45 and 00-256 (Dec. 31, 2001).

[23] Williamson Comments at 3.

[24] *Universal Service Report and Order,* 12 FCC Rcd 8776, 8819 ¶¶ 78-79 (1997). *See also Universal Service Recommended Decision,* 12 FCC Rcd 87, 122 ¶ 66 (Joint Board 1996).

[25] Equal access requirements were imposed on ILECs to prevent them from extending their market power over local service into the long distance arena. Thus, equal access is not a "service" per se – it is a requirement imposed upon dominant ILECs that inherently does not, and should not, apply to their competitors. Eventually, if and when ILECs do face meaningful competition, perhaps then the Commission could consider relieving ILECs of equal access obligations.

("ETC") process to make an "end-around" run past the statutory requirements of Section 332(c)(8).

B. Eligibility to Receive Interstate Common Line Support. NTCA takes a less drastic position than Williamson Associates; it argues that CMRS carriers should receive less in Universal Service funding that the Rural ILECs. Specifically, NTCA says that CMRS carriers should not be eligible to receive the new Interstate Common Line Support ("ICLS") that the Commission adopted recently to replace the Carrier Common Line ("CCL") charge.[26]

NTCA's argument is predicated on numerous factual inaccuracies. NTCA asserts, for example, that the "cost associated with providing [equal access] is directly related to the amount of ICLS each carrier receives under the new ICLS mechanism."[27] This is false. As noted above, ILECs recovered their equal access costs years ago. Besides, as NTCA acknowledges, the ICLS is designed to recover a portion of an ILEC's loop costs, and loop costs have nothing to do with costs of providing equal access to IXCs (which requires modifications to switch software).[28]

NTCA further asserts that wireless carriers have "no wireline local loops on which the [ICLS] mechanism is based."[29] NTCA would thus have the Commission believe that CMRS carriers incur no "last mile" costs because they use radio equipment rather than copper loops. In fact, studies have shown that the network (e.g., "last mile") costs CMRS carriers incur in the provision of their services often exceed those of ILECs.[30]

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[26] *See* NTCA Comments at 3-6.

[27] *Id.* at 3-4.

[28] *See* NTCA Comments at 3 ("The ICLS mechanism provides support equal to the interstate loop costs that ROR ILECs do not recover through revenues from subscriber line charges (SLCs) and other common line charges.").

[29] *Id.* at 4.

[30] For example, Sprint PCS' Florida cost study documented that it incurred traffic sensitive costs of $0.066 per minute in terminating traffic originating on other carrier networks. *See Sprint PCS/BellSouth Arbitration,* Docket No. 000761-TP, *Prehearing Order,* Order No. PSC-00-2535-PHO-TP (Florida, Dec. 28, 2000).

NTCA's unsupported assertion – "the Commission never assumed that multiple carriers would receive the same support" – is flat wrong. Since the inception of its post-1996 Act Universal Service program, the Commission has made portability of support a bedrock principle of Universal Service. The Commission has noted that "competitive harm . . . could be caused by providing unequal support amounts to incumbents and competitors" and that unequal funding would "stifle a competitor's ability to provide services at rates competitive to those of the incumbent."[31] Courts, in rejecting the very argument NTCA makes here, have held that "portability is not only consistent with predictability, but also is *dictated* by principles of competitive neutrality."[32]

In an ideal world, there would be no government subsidies, explicit or implicit, so carriers could compete with each other based on price and service quality. Competition will never occur, however, if the incumbent monopolist receives government subsidies but a new entrant competitor is deprived of the same support, because service pricing would be based on the levels of government subsidies given to different carriers in the market.

III. CONCLUSION

The Rural ILEC's invocation of regulatory parity – competitive CMRS carriers should be subjected to the same regulations applied to rural ILECs that possess market power – is grossly misplaced. As Chairman Powell has stated:

> If the [1996] Act means anything, it means that we should not impose regulations just for the sake of uniformity or to enact some grand regulatory plan.[33]

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[31] *Ninth Universal Service Order,* 14 FCC Rcd 20432, 20480 ¶ 90 (1999).

[32] *Alenco Communications* v. *FCC,* 201 F.3d 608, 622 (5th Cir. 2000)(emphasis added.).

[33] Separate Statement of Commissioner Powell, *Truth-in-Billing,* 14 FCC Rcd 7562, 7567 (1999).

And as the full Commission stated in an analogous situation, "Because of the disparity in market power between DBS providers and cable operators, we find unpersuasive the cable industry's call for 'regulatory parity' for entities that are not similarly situated."[34] The very structure of the Telecommunications Act of 1996 – all telecommunications are subject to minimal requirements (Section 251(a)); local exchange carriers, but not CMRS providers, are subject to additional requirements (Section 252(b)); and incumbent LECs are subject to more onerous requirements (Section 251(c)) – demonstrates clearly that Congress expected disparate regulations depending upon the extent of the entity's market power. CMRS carriers possess no market power; rural ILECs continue to yield extensive market power.

In summary, the Commission cannot, as a matter of law, impose on CMRS carriers the equal access obligations that the Rural ILECs propose. The Rural ILEC proposal that the Commission discriminate in universal service funding, while lacking in all merit, should be considered, if at all, in the Universal Service docket.

Respectfully submitted,

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[34] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act,* 13 FCC Rcd 23254, 23278 ¶ 60 (1998).

CERTIFICATE OF SERVICE

I, Lorrie Turner, do hereby certify that I have this 10th day of June 2002 served the following parties to this proceeding with a copy of the foregoing Reply Comments by placing a copy of the same in the United States Mail, first class, postage prepaid:

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